

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

SOS INTERNATIONAL LLC,)		
)		
Respondent,)		
)	Case Nos.	21-CA-178096
And)		21-CA-185345
)		21-CA-187995
PACIFIC MEDIA WORKERS GUILD,)		
COMMUNICATIONS WORKERS OF)		
AMERICA, LOCAL 39521, AFL-CIO,)		
)		
Charging Party)		

**RESPONDENT’S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE
LAW JUDGE**

COMES NOW, Respondent SOS International LLC, (“SOSi”), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, and files the following exceptions to the March 12, 2018 Decision (the “Decision”) of Administrative Law Judge (“ALJ”), Michael A. Rosas:

SOSi takes exception to:

1. The ALJ’s finding and/or conclusion that “based on extant Board precedent and longstanding interpretive principles in the area of worker classification, SOSi interpreters are employees as defined in Section 2(3) of the Act,” on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 42:24-26; *see also* JD 44:24-55:33).¹

¹ Citations to the ALJ’s Decision are formatted as follows: (JD 2:2-5) refers to page 2, lines 2 through 5 of the Decision. References to the record are set forth in Respondent’s brief in support of exceptions.

2. The ALJ's finding and/or conclusion that "SOSi exercised control [over interpreters] beyond what was required under its [government] contract with EOIR, and that such control asserted should be attributed to the company," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 45:17-19).

3. The ALJ's finding and/or conclusion that "over time SOSi has begun to take a more active role in ensuring that interpreters meet EOIR requirements," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 45:31-32).

4. The ALJ's finding and/or conclusion that SOSi's "on-site evaluations of interpreters' compliance with EOIR's procedural requirements" and use of "SCSI to evaluate interpreters' performance" are "supervisory measures [that] go beyond what is mandated by the contract, and thus may be imputed to SOSi," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 45:35-37).

5. The ALJ's finding and/or conclusion that the extent of control factor only "slightly" favors independent contractor status, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law, as this factor heavily favors independent contractor status. (JD 45:39).

6. The ALJ's failure to give sufficient weight to the extent of control factor in analyzing whether the interpreters are independent contractors or employees under the Act, on the grounds that this factor overwhelmingly supports independent contractor status and is entitled to greater weight in the factual context presented herein. (JD 1-69).

7. The ALJ's finding and/or conclusion that SOSi retaliated against interpreters who refused to accept interpreting assignments offered to interpreters by the company's regional

coordinators, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 46:8-10).

8. The ALJ's finding and/or conclusion that "the fact that interpreters were prevented from passing out business cards or otherwise soliciting business for themselves while working for SOSi evidences employee status," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 46:39-40).

9. The ALJ's finding and/or conclusion that "interpreters were at least relatively integrated into SOSi's operations," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 47:1).

10. The ALJ's finding and/or conclusion that SOSi "monitors and appraises performance [of interpreters] through recorded observations by interpreter liaisons, annual performance evaluations conducted by company personnel, and by sending recordings of interpreters' courtroom performances to SCSi for evaluation," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 47:31-34).

11. The ALJ's failure to consider evidence relating to the interpreters' operation of independent interpreting businesses, the revenue they generated from these businesses while simultaneously remaining under contract with SOSi, and the manner in which this evidence militates against a conclusion of employment status, on the grounds that this evidence, as established by the record, strongly supports independent contractor status.. (See JD 42-55).

12. The ALJ's failure to fully consider the significance of interpreters' various tax filings, business licenses, and related testimony from interpreters in the record in his analysis of whether the interpreters are engaged in and/or operate a distinct business from SOSi, on the

grounds that these facts, as established by the record, strongly support independent contractor status. (*See* JD 47:10:12).

13. The ALJ's finding and/or conclusion that because interpreters wore SOSi identification badges while interpreting at the immigration courts, the interpreters operated in SOSi's name, instead of their own, and that this fact favors employee status, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (*See* JD 47:10-17).

14. The ALJ's finding and/or conclusion that the factor considering whether the interpreters are engaged in a distinct occupation or business favors employee status, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 47:10).

15. The ALJ's finding and/or conclusion that under the circumstances of this case, the high level of skill required in the profession of interpreting is "not entitled to significant weight" in determining whether the interpreters are independent contractors or employees under the Act, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 48:18-28).

16. The ALJ's finding and/or conclusion that the factor considering whether SOSi supplies interpreters with the instrumentalities, tools, and place of work was neutral and "not overly significant" in determining whether the interpreters are independent contractors or employees under the Act, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 48:40).

17. The ALJ's finding and/or conclusion that interpreters have a potentially long-term working relationship with SOSi, which supports a finding of employee status, on the grounds

that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 49:29-35).

18. The ALJ's finding and/or conclusion that merely because interpreters may remain under contract with SOSi to perform interpreting services but are not otherwise required to accept any work assignments from SOSi during the terms of the contracts, interpreters are distinguishable from Board precedent finding that a sporadic or intermittent working relationship is evidence of independent contractor status, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 49 n. 26).

19. The ALJ's finding and/or conclusion that "because interpreters almost universally have an indefinite relationship with SOSi, which continues so long as their performance is satisfactory, this factor favors employee status," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 50:1-2).

20. The ALJ's failure to consider evidence demonstrating that interpreters receive single-interpreting assignments from SOSi, with no expectation that they will receive future assignments, and whether that supports a finding of independent contractor status under existing Board precedent, on the grounds that this evidence, as established by the record, strongly supports independent contractor status. (*See* JD 49:7-50:2)

21. The ALJ's finding and/or conclusion that interpreters were required to reserve "the entire day for a SOSi assignment, even if the assignment was only in the morning" and that "[e]ven on days when they were released early, the interpreters effectively had no ability to increase their earnings . . . because interpretation assignments are booked in advance," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 50:42-51:1).

22. The ALJ's finding and/or conclusion that the "compensation factor favors employee status," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 50:38).

23. The ALJ's finding and/or conclusion that following the "initial ICA, SOSi moved steadily toward a standardized, hourly rate structure for most interpreters," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 51:5-6).

24. The ALJ's finding and/or conclusion that the factor considering whether the interpreters' work is part of the employer's regular business favors employee status, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 51:37).

25. The ALJ's failure to consider the significance of evidence showing the parties' mutual and well-documented intent to create an independent contractor relationship, including that the Independent Contractor Agreements were the product of intense negotiations in which the interpreters sought, among other relevant things, affirmative assurances from SOSi that they could turn down work and control their own schedules consistent with their statuses as independent contractors, on the grounds that this evidence, as established by the record, strongly supports independent contractor status. (*See* JD 42-55).

26. The ALJ's finding and/or conclusion that the "interpreters' entrepreneurial opportunities also weigh in favor of employee status," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 53:13).

27. The ALJ's finding and/or conclusion that the interpreters are only "nominally free to accept and reject assignments as they wish" and that "this right is more theoretical than

actual,” on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 53:22-24).

28. The ALJ’s finding and/or conclusion that interpreters are not permitted to hire “any outside service or person when performing for SOSi,” on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 53:31-32).

29. The ALJ’s finding and/or conclusion that SOSi retaliates against interpreters for rejecting assignments in the form of reduced assignment schedules, and because of this, interpreters lack actual entrepreneurial opportunities for gain as they cannot freely reject SOSi assignments in lieu of other interpreting opportunities, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 53:46-47).

30. The ALJ’s failure to find that interpreters are free to interpret for independent interpreting agencies or interpreters’ own clients in lieu of accepting assignments with SOSi and can do so free of any reprisals, and that this evidence supports a finding that the interpreters are independent contractors, on the grounds that this finding and/or conclusion is supported by the record and correct as a matter of law. (*See* JD 53:11-54:10).

31. The ALJ’s finding and/or conclusion that because interpreters are “prohibited from soliciting business for themselves while working on SOSi assignments,” interpreters are limited in their actual entrepreneurial opportunities for gain as they cannot not solicit business while performing interpreting work at the courts as government-sanctioned, impartial interpreters, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 53:43-44).

32. The ALJ's finding and/or conclusion that "the interpreters are left with little entrepreneurial discretion in their working relationship with SOSi, outside of an essentially illusory right to accept or reject assignments unilaterally offered to them by the company," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 54:7-10).

33. The ALJ's finding and/or conclusion that SOSi's "frustration with the interpreters' concerted activity" prompted the company to insist on and implement a uniform, hourly rate structure for interpreters' method of payment, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 54:33-34).

34. The ALJ's finding and/or conclusion that SOSi has not met its burden to show that the interpreters are independent contractors, and that the majority of the traditional common-law factors and entrepreneurial opportunity factor support a finding of employee status, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 54:12-55:33).

35. The ALJ's finding and/or conclusion that SOSi has not sufficiently demonstrated that the interpreters are independent contractors because "SOSi dictates terms and asserts control far beyond what is required under its contract with EOIR," including "complete control over who is offered assignments" and punishing "interpreters who refuse assignments by offering fewer future assignments," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 54:23, 29-30).

36. The ALJ's finding and/or conclusion that "[o]ver time, the characteristics of an employer-employee relationship have only increased," including "ramped up efforts at supervision and evaluation of interpreters by sending interpretation recordings to SCSI for

review, and using company employees to evaluate interpreters' compliance with EOIR procedural requirements," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 54:32, 36-38).

37. The ALJ's finding and/or conclusion that the independent-contractor exclusion is to be interpreted narrowly and that this constituted an additional reason for finding that the interpreters are employees, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 55:24-30).

38. The ALJ's finding and/or conclusion that the fact that certain interpreters sought and obtained unemployment insurance benefits strengthens the particular interpreters' claims that they considered themselves to be employees, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 55:16-18).

39. The ALJ's findings and/or conclusions that six out of the 10 common-law factors and the entrepreneurial factor weighed either in favor of employee status or were neutral, on the grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (*See* JD 44:6-54:10).

40. SOSi also excepts to the manner in which the ALJ applied the 10 common-law factors and entrepreneurial factor to this case insofar as the ALJ's application arbitrarily and selectively diminished the importance of certain factors (*i.e.*, control and intent favors), while overemphasizing others (*i.e.*, length of time, method of payment, and entrepreneurial opportunity) without any reasonable explanation for doing so to achieve the desired outcome that the interpreters are employees under the Act, in spite of the compelling evidence demonstrating otherwise. (*See* JD 42-55).

41. The ALJ's failure throughout the Decision to fully consider the significance of the following evidence as part of his analysis regarding whether the interpreters are independent contractors or employees: (A) that interpreters perform work for their private interpreting clients coincidental with performing work for and while under contract with SOSi; (B) that it is undisputed that interpreters have the ability to freely accept or reject assignments from SOSi; (C) that interpreters have the ability to increase their earnings by working for private clients that pay more than SOSi in lieu of accepting assignments from SOSi; and (D) the lack of evidence that SOSi supervises, disciplines, or terminates interpreters for performance issues in the manner that a traditional employer would, on the grounds that this evidence, as established by the record, strongly supports independent contractor status. (*See* JD 1-69).

42. The ALJ's finding and/or conclusion that SOSi Regional Coordinator Haroon Siddiqi violated Section 8(a)(1) of the Act by questioning interpreter Aracely Weiherer about protests that occurred on August 26, 2016, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 57:24-29).

43. The ALJ's finding and/or conclusion that SOSi Regional Coordinator Haroon Siddiqi violated Section 8(a)(1) by conveying the impression to interpreter Irma Rosas that SOSi was surveilling interpreters' union activities, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 57:31-38).

44. The ALJ's finding and/or conclusion that SOSi Program Manager Martin Valencia's statement to interpreter Maria Portillo that she "was not offered a contract extension because she engaged in protected concerted activity was also coercive" and "is an independent violation of Section 8(a)(1)," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 58:1-3).

45. The ALJ's finding and/or conclusion that SOSi, through its counsel, violated Section 8(a)(1) by threatening to take legal action against certain interpreters for engaging in protected concerted activity, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 58:35-39).

46. The ALJ's findings and/or conclusions that SOSi's Publicity Clause and four provisions of Code of Business Ethics and Conduct violate Section 8(a)(1) of the Act because they prohibit employees from engaging in conduct protected by the Act, on the grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (JD 59:33-36).

47. The ALJ's findings and/or conclusions that SOSi violated Section 8(a)(3) and (1) of the Act "by refusing to renew the ICAs of Gutierrez-Bejar, Estrada, Magana, Portillo, Morris and Rivadeneira," on the grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (JD 63:35-36).

48. The ALJ's Conclusion of Law No. 3 that SOSi's refusal to renew the Independent Contractor Agreements of interpreters Jo Ann Gutierrez-Bejar, Hilda Estrada, Stephany Magana, Kathleen Morris, Maria Portillo, and Patricia Rivadeneira on September 1, 2016, and rescinding an offer to renew Maria Portillo's agreement, because these interpreters engaged in protected activities violated Section 8(a)(3) and (1), and Section 8(a)(1) of the Act, respectively, on the grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (JD 66:37-41).

49. The ALJ's Conclusion of Law No. 4 that SOSi violated Section 8(a)(1) of the Act by "interrogating employees about their protected concerted activities, engaging in surveillance, and creating the impression of surveillance on August 26, 2016, telling employees on September

15, 2016 that they would not be offered contract renewals because of their protected concerted activities and union activities, threatening legal action against employees on October 6, 2016 if they discussed protected concerted activities, and maintaining an unlawful ‘Publicity Clause’ rule in its Independent Contractor Agreements and various unlawful provisions in its SOSi Code of Business Ethics and Conduct, the Respondent violated Section 8(a)(1) of the Act,” on the grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (JD 66:43-67:2).

50. The ALJ’s Order on page 68 of the Decision that SOSi cease and desist from maintaining unlawful provisions in the SOSi Code of Business Ethics and Conduct and the Publicity Clause in interpreters’ Independent Contractor Agreements on the grounds that ordering such relief is not supported by the record and is erroneous as a matter of law. (JD 68:17-18).

51. The ALJ’s Order on page 68 of the Decision requiring SOSi to “[t]ake whatever steps are necessary to reclassify its interpreters that work at the EOIR locations nationwide, pursuant to the EOIR contract with SOSi, and treat them as employees rather than independent contractors, including rescinding any portions of the Independent Contractor Agreements and other documentation Respondent requires them to complete that purports to classify them as independent contractors,” on the grounds that ordering such relief is not supported by the record and is erroneous as a matter of law. (JD 68:41-45).

52. The ALJ’s decision to extend his findings of employment status to all approximately 1,351 SOSi interpreters nationwide despite having received limited evidence regarding the factual circumstances of interpreters other than the eight discriminatees at issue

and the one additional interpreter from southern California who testified at trial. (*See* JD 3:9-4:35, 42:24-26, 68:41-45).

53. The ALJ's Order on page 69 of the Decision that SOSi rescind or revise the sections of its Code of Business Ethics and Conduct and the Publicity Clause in interpreters' agreements so that they do not restrain or preclude employees from exercising their Section 7 rights, and notify all employees that the relevant portions have in fact been rescinded or revised, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 69:1-4).

54. The ALJ's failure to consider and rule on SOSi's Third Affirmative Defense in its Answer to the Consolidated Complaint that if the interpreters are employees of SOSi, the United States is a joint employer of these interpreters and SOSi shares the government's exemption and thus is not a Section 2(2) employer covered by the Act.

55. The ALJ's Conclusion of Law No. 1 on page 66 of the Decision that SOSi is an employer within the meaning of Section 2(2) of the Act insofar as that conclusion amounts to an implicit ruling on SOSi's Third Affirmative Defense, on the grounds that Respondent shares the government's exemption either because they are joint employer's or because it would not effectuate the purposes of the Act for the Board to exercise jurisdiction over Respondent.

56. The ALJ's recommended Notice to Employees, on the grounds that no violations of the Act have been established.

57. The ALJ's failure to dismiss the Consolidated Complaint in its entirety, on the grounds that the record fails, as a matter of law, to establish any violations of the Act.

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CONCLUSION

For the foregoing reasons, SOSi respectfully requests that the Decision of the ALJ be reversed and that the complaint be dismissed in its entirety.

Submitted this 8th day of August 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent SOS International LLC's Exceptions to the Decision of the Administrative Law Judge, which was filed today using the Board's electronic filing system, was served on the following persons by electronic mail:

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Dated this 8th day of August 2018.

/s/ Charles P. Roberts III